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Nos. 00-1770 and 00-1781

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

PEARLIE RUCKER, ET AL.

OAKLAND HOUSING AUTHORITY, ET AL., PETITIONERS

v.

PEARLIE RUCKER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RICHARD A. HAUSER
General Counsel
United States Department of Housing and Urban Development
Washington, D.C 20410

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Respondents agree (Br. 4-5) that *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), "frame[s] the analysis in this case." The Court therefore must determine, first, "whether Congress has directly spoken to the precise question at issue," and, if not, whether HUD's construction "is based on a permissible construction of the statute." *Id.* at 842-843. Under that framework, the decision of the court of appeals must be reversed. First, Congress spoke to the precise issue of when tenancies may be terminated when it plainly

provided in Section 1437d(*l*)(6), without qualification for unknowing tenants, that "*any* drug-related criminal activity" by "*any* member of the tenant's household * * * shall be cause for termination of tenancy" (emphasis added). Second, HUD's construction of the statute to mean precisely what it says is manifestly not unreasonable or impermissible; indeed, Section 1437d(*l*)(6) as so construed is not only an obviously correct construction of the statute, it rationally serves several important congressional purposes underlying the statute and is constitutional. It should be upheld according to its terms.

In leases under Section 1437d(*l*)(6), tenants agree to a principle of household-wide responsibility. No one disputes that Section 1437d(*l*)(6) permits the government to deny continued occupancy to an entire household when the actual tenant has violated the lease by engaging in drug-related criminal activity—even if the effect is to remove unknowing and entirely innocent household members. Section 1437d(*l*)(6) in effect generalizes that rule, which is based on the reality that the lease between the public housing authority and the tenant permits occupancy not merely by the tenant, but by the entire household. Just as drug-related criminal activity by the tenant may result in the removal of the entire household, drug-related criminal activity by other members of the household may, under Section 1437d(*l*)(6), have the same effect. The Ninth Circuit's attempt to eliminate that principle of household-wide responsibility should be rejected.

I. THE TEXT OF SECTION 1437d(*l*)(6) DOES NOT REQUIRE PROOF OF THE TENANT'S KNOWLEDGE

Respondents' *Chevron* burden in this case is daunting. There is not a word or phrase in Section 1437d(*l*)(6) that suggests an "unknowing tenant" exception. Respondents must thus attempt to establish not only that Congress had an intention to provide for such an unexpressed exception,

but that such intention is so clear that HUD's contrary construction is impermissible.

The principles of *Chevron* deference have particular force here, since HUD's position that there is no "unknowing tenant" exception was articulated in regulations first adopted soon after the enactment of Section 1437d(*l*)(6) and consistently adhered to in the intervening years. Considerable weight is due "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294, 315 (1933). Accord, *e.g.*, *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 414 (1993); *Edwards' Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827). "Moreover, such a contemporaneous construction deserves special deference when it has remained consistent over a long period of time." *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).[1]

1. The text of Section 1437d(*l*)(6) is unambiguous in permitting the termination of tenancy based on "any" drug activity by "any" of the specified persons, without any limitation based on the tenant's knowledge. See U.S. Br. 19-20. Respondents identify no word or phrase in Section 1437d(*l*)(6) that could be read—under even a tortured construction—to support an "unknowing tenant" exception.

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[1] This brief addresses the "unknowing tenant" exception created by the preliminary injunction. Respondents refer to a broader, and potentially even more drastic, "innocent tenant defense," which would apply in cases in which the tenant, though aware of the drug activity, "took reasonable steps to prevent the activity from occurring." Resp. Br. 3 n.2; see also Pet. App. 28a n.9. That defense is particularly untenable because a showing that the tenant cannot control drug-related criminal activity would presumably give the household an immunity from removal, regardless of the amount or seriousness of the drug-related criminal activity or the threat it posed to neighbors.

a. Respondents do complain (Br. 8) that the government "places the full weight of its 'plain language' argument on Congress's use of the word 'any' in section 1437d(*l*)(6)." That should be an ample foundation, but even without the word "any," the remaining terms of Section 1437d(*l*)(6) authorize "termination of tenancy" when a member of the tenant's household has engaged in drug-related criminal activity, with no qualification or limitation. See U.S. Br. 19-20. The term "any" simply underscores the absence of any such limitation. The court of appeals' construction permits the termination of a tenancy only on the basis of *certain* drug-related criminal activity by household members—*i.e.*, activity that the tenant knew about. Congress, however, made clear that termination of the tenancy is authorized for "*any* drug-related criminal activity" by "*any* member of the tenant's household." 42 U.S.C. 1437d(*l*)(6) (Supp. V 1999) (emphasis added). Accordingly, respondents cannot carry even the burden of showing that the court of appeals' construction is possible, let alone that it is the *only* possible construction.

b. Respondents respond with the difficult argument that Congress expressed a clear intent respecting the meaning of 42 U.S.C. 1437d(*l*)(6) that can be divined from a different statute in an entirely different title of the United States Code. Respondents argue (Br. 16) that "Congress created section 1437d(*l*)(6) in the same Subtitle in which it expressly provided an innocent owner defense for public housing tenants by amending [21 U.S.C. 881(a)(7) (1988)]"—a pre-existing forfeiture statute that already included an express innocent owner defense—to include leasehold (including public housing) interests. They conclude (Br. 16) that "[u]nder familiar standards of *in pari materia* construction, it reasonably follows that Congress understood the same innocent owner defense to apply to all public housing tenants

when confronted by the threatened loss of their leasehold interests."

Reduced to its essentials, respondents' argument is that Congress expressed an intent—a *clear* intent—to provide for an innocent owner defense in Section 1437d(*l*)(6) by amending a separate, pre-existing property forfeiture statute that already included an innocent owner defense. The problem for respondents is that the much more reasonable inference to be drawn from this legislative change is directly contrary to that urged by respondents. By leaving undisturbed the express innocent owner defense in the forfeiture statute while omitting any such defense in Section 1437d(*l*)(6), Congress surely intended that there be such a defense to forfeiture but not to termination of tenancy under Section 1437d(*l*)(6). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997) (internal quotation marks and brackets omitted). It is, at the very least, not *un*reasonable to draw that inference from the stark differences in language between Section 1437d(*l*)(6) and Section 881(a)(7). See U.S. Br. 29; *Burton* v. *Tampa Hous. Auth.*, 271 F.3d 1274, 1279-1280 (11th Cir. 2001).

Respondents also fundamentally misunderstand the law of forfeiture when they assert (Br. 18) that the forfeiture statute and Section 1437d(*l*)(6) "are identical in purpose and result." Section 881(a)(7) of Title 21 permits the federal government to obtain ownership interests in private property with which it had no previous connection whatever when it is used to facilitate a drug transaction, while Section 1437d(*l*)(6) supplies a term in a lease—a contract based on the consent of the parties—that provides the basic conditions under which a local housing authority will permit a

private individual the use of the housing authority's own property. Indeed, the lease provision required by Section 1437d(*l*)(6) creates the contractual "privity" and "consent" that this Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974), deemed significant in distinguishing forfeiture from contract remedies. *All* property — including not only fee interests and public housing leases, but also tens of millions of private leasehold interests throughout the country—is subject to forfeiture if the conditions specified in Section 881(a)(7) are satisfied, while Section 1437d(*l*)(6) applies much more narrowly to public housing leases. See U.S. Br. 29-30. In light of those differences, Congress deliberately provided for an express innocent owner defense in Section 881(a)(7); it deliberately omitted one in Section 1437d(*l*)(6).[2]

2. As HUD's regulations recognize, Section 1437d(*l*)(6) does grant PHAs discretion in deciding whether to invoke the lease's unqualified termination clause and pursue eviction in a particular case:

> In deciding to evict for criminal activity, the PHA shall have discretion to consider all of the circumstances of the case, including the seriousness of the offense, the extent of participation by family members, and the effects that the eviction would have on family members not involved in the proscribed activity. In appropriate cases, the PHA may permit continued occupancy by remaining family members and may impose a condition that family members who engaged in the proscribed activity will not reside in the unit.

[2] Respondents argue (Br. 8) that Section 1437d(*l*)(6), without an "unknowing tenant" exception, would "deprive a public housing tenant of any meaningful due process protections in seeking to avoid an eviction." Respondents' complaint, however, is not with the undoubtedly constitutional procedures that a state court would apply in an eviction action; it is with Congress's decision in enacting Section 1437d(*l*)(6) not to recognize certain substantive defenses to eviction. Section 1437d(*l*)(6) has no effect on tenants' constitutional rights to procedural protections in eviction actions.

24 C.F.R. 966.4(*l*)(5)(i) (*reprinted in* Pet. App. 171a-172a). See U.S. Br. 20-22.

a. Referring to the HUD regulation, respondents pose the question (Br. 10): "If section 1437d(*l*)(6) is a mandate from Congress to HUD to have PHAs evict any tenant * * * from public housing units where there is a violation of a drug law by a household member * * *, where does HUD find the authority to advise PHAs that they can use discretion in applying this mandate?" That question is easily answered. Section 1437d(*l*)(6) requires use of a lease provision that sets forth a "cause for termination of tenancy." Nothing in Section 1437d(*l*)(6) or any other law, however, requires public housing agencies actually to seek eviction for all violations of that (or any other) lease provision. See U.S. Br. 20-22. As with other lease violations, a PHA is authorized, but not required, to terminate tenancy for violation of the Section 1437d(*l*)(6) lease provision.[3]

b. Respondents' amici Coalition to Protect Public Housing, et al., recount a number of instances in which local public housing authorities are said to have exercised their discretion to seek eviction of tenants with "results that are unjust and so absurd as to raise doubts that Congress could ever have intended" Section 1437d(*l*)(6) to have that effect.

[3] Respondents argue (Br. 10) that HUD's regulations recognize that Congress "did not, in fact, mean 'any' literally to exclude all defenses of innocence," because those regulations provide that drug-related criminal activity by a commercial visitor making a delivery is not in itself a cause for termination of tenancy under Section 1437d(*l*)(6). The regulation to which respondents refer (*reprinted in* U.S. Br. App. 5a), however, is not based on a free-floating "unknowing tenant" exception. It is instead based on HUD's construction of "other person under the tenant's control" in Section 1437d(*l*)(6)—a phrase that HUD has acknowledged is subject to more than one possible interpretation and therefore subject to elucidation by agency regulation. See 66 Fed. Reg. 28,782 (2001).

Amici Br. 5. The narratives, by amici's own admission, are based on the tenants' stories, apparently as told by the tenants to their attorneys, then retold to attorneys for amici, and finally set forth in the latter's words in the brief submitted to this Court. See, *e.g.*, *id.* at 22 n.10 (recited facts "provided by" counsel for the tenant); see also *id.* at 8 n.2, 12 n.4, 15 n.5, 17 n.6, 20 n.8, 22 n.10, 25 n.12. These multiple hearsay accounts should not be relied upon by this Court in considering the issues in this case.[4]

Amici's narratives do, however, illustrate an important point. As the government's opening brief explains (at 35-36), self-interested tenants (as well as the household members involved) may be expected to have more or less elaborate, and difficult to verify, explanations for their claimed lack of knowledge of the drug activity that is the basis for termination of tenancy under Section 1437d(*l*)(6). Under the rule advocated by respondents and amici, a public housing authority would have to accept such self-serving explanations or disprove them in court. Public housing authorities, however, are not criminal prosecution organizations, and disproving such explanations given by two (or more) witnesses (*i.e.*, the tenant and household member or members) in a court of law is likely to be beyond the means of the housing authority. See Council of Large Public Housing Authorities, et al. (CLPHA) Amici Br. 22-23. The state of mind of the party committing a lease violation is not ordinarily a defense to eviction, and making it one here would leave the housing authority with insufficient ability to eliminate

[4] Even if all of amici's stories are entirely accurate, it is not apparent that each of the tenants involved would be subject to termination of tenancy under Section 1437d(*l*)(6), especially in light of the statutory restrictions on eviction for non-drug crimes (*i.e.*, the crime must "threaten[] the health, safety, or right to peaceful enjoyment of the premises by other tenants") and the regulatory definitions of "guest" and "other person under the tenant's control," see U.S. Br. App. 5a (newly promulgated 5 C.F.R. 5.100).

drug criminals —and those who harbor them—from public housing projects.

c. Notwithstanding the regulation expressly recognizing the discretion granted to local PHAs by Section 1437d(*l*)(6), respondents charge (Br. 25) that HUD has "implement[ed] strong rewards and punishments to compel PHAs to evict without exercising discretion." That charge is mistaken.[5]

For example, respondents quote the regulation governing the Public Housing Management Assessment Program (PHMAP), a now-superseded system under which public housing authorities' effectiveness was assessed. Under one of many criteria used in PHMAP covering "lease enforcement," public housing authorities were awarded the highest grade if "[t]he PHA Board * * * has adopted policies and the PHA has implemented procedures and can document that it *appropriately* evicts any public housing resident who *engages in*" the designated criminal activity. 24 C.F.R. 901.45(c)(1) (emphasis added). The PHMAP criterion was thus based on the need to "appropriately" evict residents who themselves "engage in" criminal activity. Cf. Resp. Br. 28 (stating that respondents "have no argument with a policy that enforces the provisions of section 1437d(*l*)(6) against actual wrongdoers"). The PHMAP criterion provided no disincentive to a PHA that exercises the discretion, explicitly recognized by HUD's regulation, to decide not to

[5] Respondents selectively quote (Br. 24-25) from presidential statements and HUD publications to support the proposition that the goal of what was called the "One Strike" policy was to evict as many tenants as possible. That is not correct. The "One Strike" policy refers to the showing necessary to support eviction—a single instance of drug-related criminal activity. It does not refer to the standards under which termination of tenancy should actually be sought, which have consistently recognized the discretion of the public housing authority to determine the appropriate action in each case. See CLPHA Amici Br. 27-29.

evict a tenant who is free of any personal involvement in criminal activity.[6]

II. LEGISLATIVE HISTORY SUPPORTS HUD'S CONSTRUCTION

The legislative history of Section 1437d(*l*)(6) strongly supports HUD's construction of the statute. See U.S. Br. 27-34, 37-44. Respondents continue to rely (Br. 14) on a single statement from a 1990 Senate committee report. But that statement discussed a bill quite different from the one that was enacted, and in any event even that statement does not suggest that public housing authorities are without authority to terminate a tenancy in any particular circumstances. See U.S. Br. 43. Other contemporaneous expressions of congressional intent, including the section-by-section analysis of the original bill containing Section 1437d(*l*)(6), see *id.* at 38-39, and a series of related measures enacted between 1988 and 1990, see *id.* at 30-32, establish that Congress was both aware that Section 1437d(*l*)(6) did not include an "unknowing tenant" exception to its otherwise clear language, and knew how to address issues relating to the termination of tenancy of "unknowing tenants" when it wanted to.

Moreover, in 1996, long after the promulgation of HUD's 1991 regulations definitively stating that Section 1437d(*l*)(6) does not admit of an "unknowing tenant" defense, Congress broadened Section 1437d(*l*)(6) to include criminal activity "on or off"—and not merely "on or near"—the public housing premises. See U.S. Br. 5. Congress also enacted other measures in 1998 that both "prohibit[ed] admission to [public housing] for any household with a member * * * who the public housing agency * * * determines is illegally using a controlled substance," 42 U.S.C. 13661(b)(1)(A) (Supp. V 1999), and authorized termination of the tenancy for those same households, see 42 U.S.C. 13662(a)(1) (Supp. V 1999). See U.S. Br. 37-44; CLHPA Amici Br. 15-21. Under respondents' theory, Congress presumably intended in all of those enactments to re-enact sub silentio an entirely implicit "unknowing tenant" exception, even where that exception would require public housing authorities to grant initial leases to households that included illegal drug users, so long as the tenant could make a case on lack of knowledge of the drug crime at issue. The much more logical conclusion is that Congress, in all of those enactments, intended to adopt HUD's longstanding administrative interpretation of Section 1437d(*l*)(6). *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); see U.S. Br. 38-42.

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[6] PHMAP applied only until September 30, 1999. 24 C.F.R. 901.1(c). The new system of assessment, entitled Public Housing Assessment System (PHAS), is similar to PHMAP in relevant respects. See 24 C.F.R. 902.1 *et seq.* Under PHAS, public housing authorities are rated on a 100-point scale, of which one point (or a fraction of a point) may be awarded for "lease enforcement." 65 Fed. Reg. 40,024, 40,025 (2000). HUD has provided that "[t]his component measures whether a PHA has formally adopted policies and implemented procedures to evict residents who the PHA has reasonable cause to believe" satisfy what HUD terms the "One-Strike" criteria—*i.e.*, residents who "[e]ngage in" criminal or drug-related activity prohibited by Section 1437d(*l*)(6) or "[a]buse alcohol" in a way prohibited by 42 U.S.C. 13662(a)(2) (Supp. V 1999) (*reprinted in* U.S. Br. App. 4a). HUD, *Instruction Guidebook for Completing Public Housing Assessment System Management Operations Certification Form HUD-50072*, at 30 (Oct. 2001) <http://www.hud.gov/utilities/intercept.cfm?/offices/reac/pdf/guidebook_oct01.pdf>. The form used by HUD asks, *inter alia*, for "[t]he total number of evictions as a result of the One-Strike criteria." *Ibid.* HUD has noted, however, that "PHAs are scored for this component based on the formal adoption and implementation of eviction policies and procedures and [whether the PHA] has incorporated One-Strike criteria in the eviction of residents." *Id.* at 31. While the raw number of evictions may provide HUD with information that is useful in discussions with PHAs regarding the level of their crime problem, the PHA's score is based on the adoption and implementation of "appropriate" policies for evicting residents who "[e]ngage in" the prohibited activities, not the total number of evictions.

III. HUD'S CONSTRUCTION RATIONALLY SERVES THE STATUTORY PURPOSES

Congress enacted Section 1437d(*l*)(6) in response to a "reign of terror" caused by drug-related violence in public housing. 42 U.S.C. 11901 (1994 & Supp. V 1999). Congress made express findings that "public * * * housing in many areas suffers from rampant drug-related or violent crime," which "leads to murders, muggings, and other forms of violence against tenants," as well as "a deterioration of the physical environment" in the projects. 42 U.S.C. 11901(2) and (4) (Supp. V 1999). Those findings were well supported. Amici International City-County Management Association, et al., explain in detail (Br. 6-10) that, at around the time Section 1437d(*l*)(6) was enacted, the violent crime rate in public housing developments was frequently several times higher than the local average. The court of appeals itself agreed that public housing projects had become "little more than illegal drug markets and war zones," in which "[i]nnocent tenants live barricaded behind doors, in fear for their safety and the safety of their children." Pet. App. 2a.

Section 1437d(*l*)(6) as interpreted by HUD—*i.e.*, without an "unknowing tenant" exception—addresses the crisis situation in a number of ways. First, Section 1437d(*l*)(6) gives maximum incentives to tenants to prevent, discover, and remedy drug problems of household members, rather than to ignore them and thereby retain a defense to eviction. See U.S. Br. 35. Respondents argue (see Br. 29-30) that the incentive is not effective with respect to an "unknowing" tenant who is actually evicted, but the general deterrent effect of the rule of household-wide responsibility is obvious. Respondents also argue (Br. 31) that, absent an "unknowing tenant" exception, some tenants might be afraid to report drug-related criminal activity by their household members to housing management. It is uncertain whether tenants are likely to report drug-related crimes by household members in any event. More importantly, amici's views on whether the incentive structure created by Section 1437d(*l*)(6) in fact works out in practice as Congress intended is of no significance. It is entirely rational for Congress to decide not to include an "unknowing tenant" exception in order both to increase the incentives for tenants to control household members and ban lawbreaking guests from their premises and to decrease the incentives for tenants to remain ignorant of drug-related criminal activity.

Second, adding an "unknowing tenant" exception would create severe enforcement problems. See pp. 8-9, *supra*. Contrary to the court of appeals, see Pet. App. 28a, respondents now concede (Br. 30) that "it is the tenant who has the burden of raising and proving the defense." Even so, the public housing authority will likely face similar obstacles in rebutting the likely testimony of the self-interested tenant and household member that the tenant had no knowledge of the drug-related activity. Respondents argue (*ibid.*) that "[t]he government's burden of rebuttal is no more onerous tha[n] it is in connection with any other affirmative defense." Few if any contract or lease defenses, however, require the parties to litigate the tenant's state of mind, as would an "unknowing tenant" defense.[7]

Third, household-wide responsibility under Section 1437d(*l*)(6) helps housing authorities obtain agreements from tenants in appropriate cases to bar the individual engaged in drug-related activity from the premises. Respondents assert (Br. 30) that there will be no "bargaining chip" under

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[7] Respondents argue that "HUD has not suggested that the existence of an innocent tenant defense makes the provisions of section 881(a)(7) of 'limited value in restoring peace and security to public housing projects.'" Resp. Br. 30 (quoting U.S. Br. 35). Forfeiture actions, however, serve a law enforcement function, are typically undertaken by agencies that have substantial investigative tools available, and are not designed specifically to restore peace to public housing projects.

the HUD interpretation because tenants will be afraid to seek assistance from management. Management, however, has a "bargaining chip" in cases in which it takes the initiative since Section 1437d(*l*)(6) provides the leverage necessary in appropriate cases to encourage tenants to bar drug criminals from their units. Indeed, without such leverage, public housing authorities do not generally have the legal authority to dictate to tenants which household members or guests may be admitted to the unit. See CLPHA Amici Br. 25 (explaining that "as a practical matter, the use of removal and bar is dependent upon the tenant's agreement").[8]

Finally, household-wide responsibility under Section 1437d(*l*)(6) is ultimately based on the proposition that the households of those public housing tenants who—knowingly or unknowingly—harbor drug criminals pose a threat to their neighbors, and that the scarce resource of public housing should be allocated to tenants whose household members do not so threaten their neighbors' security. See U.S. Br. 37. Holding tenants responsible for the conduct of their household members and guests is not uncommon in leases, including elsewhere in the public housing leases at issue in this case. See *id.* at 23-24. Respondents' social policy objections to that principle should be addressed to Congress, not the courts.

IV. THERE ARE NO ALTERNATIVE GROUNDS FOR AFFIRMANCE

Respondents' amici Lawrence Lessig, et al., do not attempt to support the court of appeals' actual reasoning and holding. They argue instead as alternative grounds for affirmance

[8] In many cases involving a minor child engaged in drug activity, barring the minor child while permitting the tenant to remain may not be realistic or desirable. The rationale of household-wide responsibility under Section 1437d(*l*)(6) is, *inter alia*, that parents and guardians should be given maximum incentive to prevent drug activity by their household members before it occurs.

that it is a "faulty premise" to conclude that lease terms that would support eviction "would, as a matter of contract law, be strictly enforced," Br. 15; see Br. 15-22, and that "the leases actually at issue in this case would not support Respondents' eviction," Br. 2; see Br. 6-15. See also Resp. Br. 42-44. Those theories provide no basis for affirming the decision below.

1. The decision below cannot be affirmed on the basis of state contract or landlord-tenant law. Even under general principles of landlord-tenant law, a court may not add limitations and qualifications to a lease provision prescribed by legislation. As the Rhode Island Supreme Court explained, in discussing strict enforcementof a lease provision, "the prevailing view * * * is '* * * that where the law prescribes there shall be a forfeiture the court cannot say there shall be none; that the expression of the legislative will * * * (is) not to be defeated upon the ground that the law is harsh and severe in its character." *Housing Auth.* v. *Massey*, 335 A.2d 914, 915-916 (R.I. 1975) (citing cases). A court may not "reject the balance that [the legislature] has struck in a statute." *United States* v. *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. 1711, 1721 (2001). See also, *e.g.*, *Minnesota Pub. Hous. Auth.* v. *Lor*, 591 N.W.2d 700, 704 (Minn. 1999) ("[A] lease is a form of contract. Unambiguous contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh.") (footnote omitted).

If it were otherwise—if the law of a particular State attempted to add limitations to the grounds for termination of tenancy specified in lease terms under Section 1437d(*l*)(6) —then that law would be preempted. A state law that conflicts with a federal statute, see *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 869-874 (2000), or frustrates its purposes, see *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 (2000), is preempted. See also *City of New*

York v. *FCC*, 486 U.S. 57, 64 (1988) (similar preemption for regulations). Congress has determined in Section 1437d(*l*)(6) that *any* drug-related criminal activity by *any* household member "shall be cause for termination of tenancy," without regard to the tenant's knowledge of the activity. Section 1437d(*l*)(6) does not give the States a license to engraft whatever limitations and qualifications on termination of tenancy they deem advisable. A State could no more create an "unknowing tenant" exception to Section 1437d(*l*)(6) than it could an exception for criminal activity related to certain particular drugs (marijuana, for example), certain household members (adult household members, for example), or certain categories of public housing (low-rise units, for example). Although amici rely (Br. 21) on purported "equitable considerations," even "a court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. at 1721 (quoting *Virginian R.R.* v. *Railway Employees*, 300 U.S. 515, 551 (1937)).

In any event, the decision below was not based on—and cannot be defended on the basis of—state contract or landlord-tenant law. Neither court below cited or discussed state-law precedents. The district court refused to abstain in this case on the ground that OHA had "not identified what important state interests are implicated by an unlawful detainer action which involves federally subsidized housing and the interpretation and constitutionality of a lease provision mandated by federal regulations." Pet. App. 146a. The court of appeals similarly made entirely clear that its decision was based on "the proper interpretation of § 1437d(*l*)(6)." *Id.* at 10a; see also Pet. 29. This Court should decide the federal question on which certiorari was granted, not a state-law question that was not passed upon below.

2. The terms of respondents' lease also do not provide an alternative ground for affirmance. Both courts below held

that respondents' leases embody the rule adopted by HUD that precludes an "unknowing tenant" defense, thereby rejecting amici's (and respondents') creative construction of the leases. The court of appeals noted that the lease provisions were "simply the embodiment of" what the court held was HUD's "erroneously broad interpretation of § 1437d(*l*)(6)." Pet. App. 28a. The district court similarly held that the lease terms were "mandated by federal regulations." *Id.* at 146a. There is no reason for this Court to revisit that fact-specific conclusion, rather than decide the questions of far more general importance on which certiorari was granted.[9]

V. SECTION 1437d(*l*)(6) IS CONSTITUTIONAL

Although the court of appeals purported to rest its decision in part on the principle of constitutional avoidance where a statute is ambiguous, see Pet. App. 23a-27a, Section 1437d(*l*)(6)—especially in light of HUD's authoritative construction—is not ambiguous. Accordingly, even the existence of a genuine and serious constitutional doubt would not warrant distorting the plain statutory meaning. In any event, respondents' various efforts to identify constitutional problems in Section 1437d(*l*)(6) fail to raise any such "serious" constitutional doubt. See U.S. Br. 46-49.

1. Based on the proposition that "[p]ublic housing tenants indisputably hold protected property rights in their leases," respondents argue that what they term the "seizure of public housing from innocent tenants is precisely the kind of arbitrary deprivation of property that due process forbids." Resp. Br. 34. To the extent that respondents argue (*ibid.*)

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[9] The decision of the court of appeals could not in any event be affirmed on these grounds because the injunction that court affirmed generally limited OHA's ability to terminate leases. See Pet. App. 165a-166a. Such an injunction could not have been based on the specific terms of respondents' leases (or on any other facts specific to respondents) since it extends to *all* of OHA's tenants, regardless of the terms of their leases.

that the eviction of "unknowing" tenants authorized by the statutorily-mandated lease provision is "without any reasonable justification" and serves no "legitimate governmental objective," those arguments have already been addressed herein. See pp. 12-14, *supra*.

In any event, the fact that tenants have a "property interest" in their leases establishes only that they are entitled to full procedural due process protections before those leases are terminated. *Greene* v. *Lindsey*, 456 U.S. 444, 450-451 (1982). It does not suggest that particular substantive lease terms regarding the conditions of their occupancy violate the Constitution. To the contrary, the substantive lease term required by Section 1437d(*l*)(6) specifically limits the property interest that respondents have acquired.

The cases cited by respondents (Br. 35-37) do not support the kind of constitutional limitations on substantive provisions in public housing leases (or, perhaps, in other government contracts) that respondents seek. Those cases are based on the principles that there may be limits on the extent to which the government may criminalize mere membership in an association, see *Scales* v. *United States*, 367 U.S. 203 (1961), and that government employment may not be conditioned, see *Wieman* v. *Updegraff*, 344 U.S. 183 (1952); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967), nor civil liability imposed, see *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), based on an individual's exercise of constitutionally protected associational rights. Termination of tenancy under Section 1437d(*l*)(6) is not based on tenants' exercise of constitutionally protected rights. It is based on the breach of lease terms agreed to by tenants that serve important public purposes that redound to the benefit of public housing tenants generally.

2. Respondents argue (Br. 37) that *Plyler* v. *Doe*, 457 U.S. 202 (1982), supports their argument, because the Court

in that case stated that "legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." *Id.* at 220. *Plyler*, however, did not involve a contract, and the general principle for which respondents cite it—that the law may not impose disabilities on children for their parent's misconduct—has nothing to do with this case. To the contrary, it is presumably common ground that children *may* be removed from their apartments—sometimes with dire consequences—when their parents have violated conditions of their leases. Conversely, many States have enacted laws that impose liability on custodial parents or guardians for torts committed by their children.[10] Liability under those statutes is entirely a matter of legal compulsion, unlike Section 1437d(*l*)(6), which is based on the enforcement of lease provisions to which the tenant has agreed. The constitutionality of Section 1437d(*l*)(6) follows a fortiori from the constitutionality of the parental liability statutes. See, *e.g.*, *In re B.D.*, 720 So. 2d 476, 478-479 (Miss. 1998); *Distinctive Printing & Packaging Co.* v. *Cox*, 443 N.W.2d 566 (Neb. 1989); *Board of Educ.* v. *Caffiero*, 431 A.2d 799, 805 (N.J. 1981); *In re Sorrell*, 315 A.2d 110, 114-116 (Md. 1974); but see *Corley* v. *Lewless*, 182 S.E.2d 766 (Ga. 1971), limited by *Hayward* v. *Ramick*, 285 S.E.2d 697 (Ga. 1982).

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[10] See, *e.g.*, Ariz. Rev. Stat. Ann. § 12-661 (West Supp. 2001); Cal. Civil Code § 1714.1 (West 1998); Conn. Gen. Stat. Ann. § 52-572 (West Supp. 2001); Fla. Stat. Ann. § 741.24 (West 1997); Ind. Code Ann. § 34-31-4-1 (Michie 1998); La. Civ. Code Ann. art. 2318 (West 1997); Mass. Gen. Laws Ann. ch. 231, § 85G (West 2000); Me. Rev. Stat. Ann. tit. 14, § 304 (West Supp. 2001); Miss. Code Ann. § 43-21-619 (1999); Mo. Ann. Stat. § 537.045 (West 2000); Mont. Code Ann. § 40-6-237 (1999); Neb. Rev. Stat. Ann. § 43-801 (Michie 1999); N.Y. Gen. Oblig. Law § 3-112 (McKinney 2001); Ohio Rev. Code Ann. § 3109.09 (Anderson 2000); Okla. Stat. Ann. tit. 23, § 10 (West Supp. 2002); Or. Rev. Stat. § 30.765 (1999); 23 Pa. Cons. Stat. Ann. § 5502 (West 1991); Tenn. Code Ann. § 37-10-103 (1996); Wis. Stat. Ann. § 895.035 (West Supp. 2000).

More fundamentally, *Plyler* was based on the fact that the state law in that case, which deprived children of undocumented aliens of the ability to attend public schools, "impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling status." 457 U.S. at 223. The Court's conclusion in *Plyler* that such a classification violates the Equal Protection Clause has no bearing on the question whether the lease term required by Section 1437d(*l*)(6) is constitutional.

3. Finally, respondents argue (Br. 47) that the lease provision required by Section 1437d(*l*)(6) "violates the Eighth Amendment's excessive fine prohibition." As this Court has explained, "[t]he Excessive Fines Clause * * * limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *United States* v. *Bajakajian*, 524 U.S. 321, 328 (1998) (internal quotation marks omitted). Because the Clause has to do with the involuntary imposition by the government of penalties on an individual, it has been applied to forfeitures of property (as in *Bajakajian*), which are not based on consent. The Excessive Fines Clause has nothing to do with the terms on which the government and a private party may contract for the private individuals' use of government property, nor does it have any application to the circumstances under which the government may enforce its contractual and property rights to take back possession of its own premises. Expanding the Excessive Fines Clause to police government contracts or leases would be inconsistent with its text, purposes, and history.

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For the reasons given above and those in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

RICHARD A. HAUSER
General Counsel
United States Department of Housing and Urban Development

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